United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1931

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75

No. 5502

LLEWELLYN JORDAN, APPELLANT,

vs.

Gamble Latrobe, receiver of the
AIR MAIL APPARATUS CORPORATION OF AMERICA, A CORPORATION, AND FRANCIS C. ROBERTS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 24, 1931.

PRINTED NOVEMBER 7, 1931.

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5502

LLEWELLYN JORDAN, APPELLANT,

vs.

AIR MAIL APPARATUS CORPORATION OF AMERICA, A CORPORATION, AND FRANCIS C. ROBERTS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1931.

Court of Appeals of the District of Columbia

No. 5502.

LLEWELLYN JORDAN, Appellant,

vs.

AIR MAIL APPARATUS CORPORATION OF AMERICA, a Corporation, and FRANCIS C. ROBERTS.

a Supreme Court of the District of Columbia.

In Equity.

No. 52726.

LLEWELLYN JORDAN, Plaintiff,

vs.

AIR MAIL APPARATUS CORPORATION OF AMERICA, a Corporation, and FRANCIS C. ROBERTS, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Amended Bill to Set Aside Transfer and for Receiver.*

Filed May 13, 1931.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 52726.

LLEWELLYN JORDAN, Plaintiff,

vs.

AIR MAIL APPARATUS CORPORATION OF AMERICA, a Corporation, and FRANCIS C. ROBERTS, Defendants.

The plaintiff, Llewellyn Jordan, with leave of Court first had and obtained, files this his amended bill of complaint

and respectfully shows unto this Honorable Court as follows:

1. That he is a citizen of the United States and a resident of the State of Maryland, and files this suit in his own right.

2. That the defendant Air Mail Apparatus Corporation of America, is a corporation organized under the laws of the State of Delaware, and doing business in the District of Columbia; that it is to all intents and purposes a District of Columbia corporation, having its main office and all its business in the District of Columbia where all the books are kept, where the President Francis C. Roberts and its Vice-President and Secretary Karl O. Spiess, reside, and where plaintiff is informed and believes and therefore avers all its directors reside; that it was incorporated under the State of Delaware for the purpose of taking advantage of the liberal laws of that State, but that it was never intended by the Corporation that it should have other than a formal office at the Corporation Trust Company there, and that it has never had more than that: that it is sued in its own right; that the defendant Francis C. Roberts is a citizen of the United States and that since the filing of the original bill of complaint herein plaintiff has been informed and believes and therefore avers that said defendant Roberts is a resident of the District of Columbia; that said defendant Francis C. Roberts is sued in his own right.

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3. That plaintiff is a creditor of the defendant corporation upon a certain note dated the 9th day of December, 1929, in the sum of $5,000.00, payable on demand, for money loaned by him to said corporation; that demand therefor has been duly made and refused; that he is also a creditor of the corporation in various sums aggregating $622.70, the subject-matter of a suit filed April 6, 1931, in the Municipal Court of the District of Columbia, as Law A. 7758; that he is informed and believes that there are other creditors of the corporation among whom are Harlan Wood, Esq., who is a creditor upon an unfulfilled claim for legal services based upon a contract dated November 5, 1929, for ten years at a minimum sum of Seventy-two Hundred Dollars ($7200.00) per year; that since the filing of the original bill of complaint in this cause said Harlan Wood has filed a suit in this Court known as Harlan Wood

v. Air Mail Apparatus Corporation, Law No. 79567, wherein said Wood alleges that the defendant corporation is indebted to him in the sum of $10,800.00 for attorney's fees under said written contract; that plaintiff is informed that said sum of $10,800.00 covers only the amount due said Wood for a period of a year and a half under said contract for ten years, leaving remaining an unexpired portion of said contract of eight and one half years; that in addition to said debts plaintiff is informed and believes that there were due and owing from said defendant corporation to various creditors on or about February 4, 1931, various debts aggregating $1542.58, being the amounts due to the various individuals set forth in an itemized list thereof attached hereto marked Exhibit "D" and prayed to be read as a part hereof; that said debts are in addition to those due to this plaintiff and to said Wood as hereinbefore set forth; that plaintiff is informed and believes that the greater part, if not the whole, of said debts set forth in said Exhibit "D" still remains due and unpaid with the possible exception of the item of $500.00 for revenue stamps as to which plaintiff has no definite information.

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4. That plaintiff is likewise a stockholder and one of the original stockholders of said defendant corporation, holding in his own right 130 shares of stock; that of the said shares 30 shares were given him shortly after the corporation was organized for advances in cash made by him to the State of Delaware for the formation of the corporation, and for services rendered prior and subsequent to the formation thereof in the capacity of office manager for three months and Vice-President and Treasurer; that the remaining 100 shares were transferred to him by the defendant Roberts out of his personal holdings in consideration for a personal loan by plaintiff to said defendant Roberts; that said Harlan Wood is the owner of 3555 shares in his own right, and is one of the original incorporators; that there are numerous other minority stockholders widely scattered in various parts of the United States.

5. That by a certain agreement between defendant Francis C. Roberts and defendant Air Mail Apparatus Corporation of America dated November 5, 1929, and recorded in the United States Patent Office January 3, 1930,

in Liber F. 142, p. 543, a true photostatic copy of which is attached to the original bill of complaint herein, marked Exhibit "A" and prayed to be read as a part hereof, said defendant Francis C. Roberts assigned to said defendant Air Mail Apparatus Corporation of America all his right, title and interest in and to an air mail apparatus invention identified in application Serial No. 324602, filed in the United States Patent Office December 8, 1928; that
4 plaintiff is advised that said assignment is absolute and not revocable by reason of the non-payment of the considerations in said agreement recited; that plaintiff is further informed and believes that by a certain purported assignment dated March 18, 1931, and recorded in the United States Patent Office March 23, 1931, in Liber W. 147, at page 457, said defendant corporation purporting to act through its Vice-President, Karl O. Spiess, and its Assistant Secretary, W. T. Woodhouse, Jr., assigned all of its right, title and interest to said defendant Francis C. Roberts, all of which will more fully appear by a true photostatic copy of said assignment attached to the original bill of complaint herein marked Exhibit "B" and prayed to be read as a part hereof; that the transfer to the corporation of said letters patent was the only payment as plaintiff is informed and believes ever made by defendant Roberts for his stockholdings in defendant corporation; and that plaintiff is informed and believes that although the defendant corporation has purported to reassign said letters patent to defendant Roberts, the latter has never returned to defendant corporation the shares of stock given as the original consideration for said letters patent.

6. That plaintiff is informed and believes that by a certain paper writing dated December 15, 1928, a true copy of which is attached to the original bill of complaint herein marked Exhibit "C" and prayed to be read as a part hereof, said defendant Francis C. Roberts purported to transfer to said Harlan Wood, Esq., 49% of his sole right, title and interest in and to the patent aforesaid; that the same was, as plaintiff is informed and believes, recorded in the office of the Recorder of Deeds of the District of Columbia, as Instrument No. 87, March 18, 1929, and thereafter recorded in the United States Patent Office February 24, 1931, in Liber N. 147 at page 340, the original of which

instrument plaintiff is informed and believes is in
5 the possession of said Harlan Wood.

7. That plaintiff is informed and believes that said patent has no cash value and can be of no value whatsoever except in the hands of persons who may have the money to promote the same; that in addition the only other asset known to plaintiff (other than furniture of the approximate value of $100.00 claimed by plaintiff as security) is a complete machine specially fabricated according to said patent and having no cash value; that said corporation is without funds to pay its debts and is insolvent; that plaintiff is informed and believes that by reason of the insolvency of the defendant and the various law suits that have been filed against it and the defendant Francis C. Roberts, the latter has already transferred from the District of Columbia said specially fabricated machine, and plaintiff believes that said defendant Roberts will depart the jurisdiction of this Court, and take with him all the assets, books, records and papers of said corporation, in order to defeat the rights of the plaintiff and other creditors of said corporation, and to defeat the rights of plaintiff as a stockholder and the rights of other stockholders similarly situated; that part of plaintiff's claim against said defendant corporation of $622.70 referred to in Paragraph 3 hereof was the sum of $300.00 advanced by plaintiff out of his own pocket to the Ballauf Manufacturing Company for the manufacture of said specially fabricated machine.

8. That plaintiff is informed and believes and therefore avers that the aforesaid purported assignment of March 18, 1931, between said defendant corporation and said Roberts was without any real consideration, said Roberts having recently told plaintiff and his attorney that he is without funds; that it was without the authority of the stockholders of said corporation, no meeting having been called for the purpose of authorizing the same or any notice being given
to the stockholders; that it was in other respects an
6 irregular action not binding upon the corporation;
that it was done to defraud, hinder and delay the creditors of the corporation, and in particular this plaintiff; that plaintiff is advised that if the transfer from defendant corporation to said Roberts was for the purpose of cancelling the agreement in Exhibit "A" the transfer

is none the less illegal, inasmuch as that transfer was absolute.

9. That the purported assignment of March 18, 1931, deprives the corporation of its only valuable asset; that the corporation was formed for the purpose of exploiting the invention described in said petition, and that without it the corporate purpose cannot be carried on; that by reason of the insolvency and non-residence of said corporation and the existence in the District of Columbia of claims against said corporation as aforesaid, a receiver or receivers should be appointed for the purpose of receiving an assignment of said letters patent from defendant Roberts and to hold *pendente lite,* and for the purpose of taking over and preserving the books, records and assets of said corporation, if any may be found, in order that the rights of creditors and stockholders of the defendant corporation may be properly determined and adjudicated; that otherwise the plaintiff and other creditors and stockholders of said corporation will suffer irreparable injury.

10. That all the matters and things herein averred by plaintiff to have been on information and belief plaintiff expects to prove at the trial hereof; that plaintiff believes that unless restrained by this Court the defendant Francis C. Roberts may attempt to make an assignment of said patent to some person or persons for value or otherwise with the result that the title to said patent will thereby become further encumbered; that plaintiff is without remedy at law.

Wherefore, the premises considered, plaintiff prays:

7 1. That a temporary injunction issue herein forbidding defendant Francis C. Roberts to assign or otherwise dispose of the patent herein described, and that pending this suit a receiver or receivers shall be appointed for the purpose of receiving from said defendant Roberts title to said patent, and for the purpose of taking into his or their possession and preserving all the other assets, if any, books, records and papers of said corporation.

2. That by a final order defendant Roberts be required to reassign said patent to said defendant corporation.

3. That plaintiff have such other and further relief as to the Court may seem meet and proper.

LLEWELLYN JORDAN.

OFFUTT, IMLAY & SNYDER,
By CHARLES V. IMLAY,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Llewellyn Jordan, being first duly sworn, on oath deposes and says that he has read the foregoing Bill by him subscribed and knows the contents thereof; that the matters and things therein set forth as of personal knowledge are true, and those set forth upon information and belief he believes to be true.

LLEWELLYN JORDAN.

Subscribed and sworn to before me this 12 day of May, A. D. 1931.

OLIVE E. FITZGERALD, [SEAL.]
Notary Public, D. C.

8 Filed Apr. 15, 1931. Frank E. Cunningham, Clerk.

EXHIBIT "A".

Agreement.

This agreement made by and between Francis C. Roberts, of Washington, D. C., hereinafter referred to as the first party, and Air Mail Apparatus Corporation of America, Inc., a Delaware corporation, hereinafter referred to as the second party, witnesseth as follows:

Whereas the first party, under date of November 2nd, 1929, made an offer in writing to the second party as follows:

"Air Mail Apparatus Corporation of America, Inc.,
Washington, D. C.

DEAR SIRS:

In consideration of the issuance to me of sixty thousand (60,000) shares of stock of the par value of $10.00 each of your corporation, and in further consideration of your agreeing to pay me One Hundred Thousand Dollars ($100,000) cash under the terms outlined below, and in further consideration of your agreeing to employ me as General Manager of your Corporation for a period of ten years under the terms as outlined below, and in further consideration of your Corporation agreeing to assume all obligations contracted for and made by me in the prosecution of the application for the patents referred to below, all divisions

thereof and any and all improvements I may hereafter conceive or make with reference to said apparatus and system, for trade-mark registrations and the system referred to below, for preliminary work in interesting the Post Office Department and various air port companies and other commercial enterprises up to the date of the acceptance of this offer, the total sum of said obligations not to exceed the sum of Five Thousand Dollars ($5,000), and in further consideration of your Corporation agreeing to defend any and all suits instituted in relation to any and all of the patents issued on the invention identified in said application and to pay all expenses in connection with the defense of said suits, I hereby offer to sell, assign, transfer and deliver to your Corporation the following in full payment for said stock and said other considerations:

All of my right, title and interest in and to an air mail apparatus invention identified in Application Serial No. 324602, filed in the United States Patent Office, December 8, 1928.

All of my right, title and interest in an authorization granted me by the United States Post Office Department to install said air mail apparatus in certain post offices in the United States.

All of my right, title and interest in a system for operating, installing and maintaining said air mail apparatus.

9 All of my right, title and interest in the trade-mark, a design consisting of the representation of an eagle, an air plain engine, a dial, etc., identified as United States Registration No. 256641, issued May 21, 1929.

All of my right, title and interest in the trade-mark "Amaca" for air mail apparatus.

The One Hundred Thousand Dollars ($100,000) cash is to be paid by you to me as follows: Five Thousand Dollars ($5,000) in cash immediately upon the execution and delivery of a written agreement between us following the acceptance of this offer. The balance of Ninety-five Thousand Dollars ($95,000) is to be paid me from time to time, either as twenty-five per cent (25%) of the receipts by you from the sale of stock of your Corporation, or a like percentage from the earnings of your Corporation, whichever of said receipts or said earnings are first in hand by your Corporation, or both, until said amount of Ninety-five

Thousand Dollars ($95,000) is paid in full; the said indebtedness of Ninety-five Thousand Dollars ($95,000) to be represented by nineteen (19) demand notes, each in the amount of Five Thousand Dollars ($5,000), executed by your Corporation and payable to me.

Your Corporation to enter into a contract of employment with me under the terms of which you will agree to employ me as your General Manager for a period of ten years from the date of said employment agreement, and to pay me as said General Manager a salary of not less than Twelve Thousand Dollars ($12,000) per annum, payable monthly in advance, and said salary to be at all times not less than the amount which your Corporation pays or agrees to pay to its highest paid officer, executive or employee; in addition your Corporation to pay all travelling expenses incurred by me as said General Manager during said period.

If you desire to accept the above offer on the terms and conditions herein stated, please note your acceptance upon the duplicate original hereof enclosed herewith, and return said duplicate original to me.

Yours very truly,

(Sgd.) F. C. ROBERTS.

F. C. ROBERTS."

and

Whereas, the second party, under the authority of a resolution passed by the board of directors at a meeting duly called and held on November 2nd, 1929, accepted said offer by endorsement on said offer under date of November 2nd, 1929;

Now, therefore, the parties hereto agree as follows:

1. The first party, in consideration of the premises and of one dollar ($1.00) paid by the second party to the first party, receipt of which is hereby acknowledged, hereby sells, assigns and transfers to the second party all of his right, title and interest in the following:

An air mail apparatus invention identified in Application Serial No. 324602, filed in the United States Patent Office, December 8, 1928.

An authorization granted the first party by the United States Post Office Department to install said air mail apparatus in certain post offices in the United States.

A system for operating, installing and maintaining said air mail apparatus.

The trade-mark, a design consisting of the representation of an eagle, an airoplane engine, a dial, etc., identified as United States Registration No. 256641, issued May 21, 1929.

The trade-mark "Amaca" for air mail apparatus.

2. The second party, in consideration of the premises and of one dollar ($1.00) paid by the first party to the second party, receipt of which is hereby acknowledged, hereby agrees simultaneously with the execution of this instrument to deliver to the first party stock certificate for sixty thousand (60,000) shares capital stock having a par value of Ten Dollars ($10.00) per share of the original authorized capital stock of the said Air Mail Apparatus Corporation of American, Inc., also Five Thousand Dollars ($5,000) in cash and nineteen (19) demand promissory notes of the second party payable to the order of the first party in the sum of Five Thousand Dollars ($5,000) each, and the second party agrees to pay the first party the total sum of Ninety-five Thousand Dollars ($95,000), represented by the said demand notes, out of the receipts by the second party from the sale of its stock to the full amount of twenty-five per cent (25%) of said receipts, or out of the net earnings of the second party to the full extent of twenty-five per cent (25%) of said earnings, whichever of said receipts or said earnings are first in hand by the second party, or both, until said amount of Ninety-five Thousand Dollars ($95,000) is paid in full.

3. The second party hereby agrees to employ the first party as its General Manager for a period of ten years from the date of this agreement, and to pay the first party a salary of not less than Twelve Thousand Dollars ($12,000) per annum, payable monthly in advance, and further agrees

11 to pay the first party an annual sum or sums which will cause the salary of the first party to be at all times not less than the amount which the second party pays or agrees to pay to its highest paid officer, executive or employee, said payments in excess of said sum of Twelve Thousand Dollars ($12,000) per annum to be payable for and during the time or times in which any said officer, executive or employee of the second party is employed on a basis of more than Twelve Thousand Dollars ($12,000) per annum.

4. The second party hereby agrees to pay all travelling expenses of the first party incurred by the first party in

carrying out his duties as General Manager as aforesaid; and to otherwise carry out the terms of said offer in each and every respect.

In witness whereof, the first party has hereunto affixed his signature and seal, and the second party has caused these presents to be signed in its name and on its behalf by its Vice President and its corporate seal to be hereunto affixed and attested by its Secretary, all on the 5th day of November A. D. 1929.

F. C. ROBERTS. [SEAL.]

AIR MAIL APPARATUS CORPORATION OF AMERICA, INC.,

By LLEWELLYN JORDAN,

Vice-president.

Attest:

[Corporate Seal Air Mail Apparatus Corporation of America, Inc., Amaca.]

HARLAN WOOD,

Secretary.

Recorded Transfers of Patents, U. S. Patent Office, Jan. 3, 1930. Liber F 142, Page 534.

THOMAS E. ROBERTSON,

Commissioner of Patents.

12 EXHIBIT "B."

Filed Apr. 15, 1931, Frank E. Cunningham, Clerk.

Liber W147, Page 457.

Know all men by these presents.

That we, The Air Mail Apparatus Corporation of America, a body corporate, incorporated under the laws of the State of Delaware, for and in consideration of the sum of One Dollar ($1.00), lawful currency of the United States of America, in hand paid, do by these presents, bargain, sell and convey unto Francis C. Roberts all of our right, title and interest in and to:

(1) An air mail apparatus invention identified in application serial number 324603 filed in the United States Patent Office December 8th, 1928, and to which letters patent

were issued under patent number 1,741,000 on December 24th, 1929.

(2) A trade-mark, being a design consisting of the representation of an eagle, an air plane engine, a dial, etc., identified as United States Registration number 256641, issued May 21st, 1929.

(3) The unregistered trade-mark "Amaca" for air mail apparatus.

(4) The good will of the business in which the hereinbefore registered trade-mark is used.

To have and to hold by the said Francis C. Roberts absolutely free and clear of any and all incumbrances whatsoever.

In testimony whereof, The Air Mail Apparatus Corporation of America, Inc., has on this 18th day of March, 1931, caused these presents to be signed by Karl O. Spiess, its Vice President, and attested by its Assistant Secretary, and its corporate seal to be affixed and doth hereby appoint Karl O. Spiess its true and lawful attorney in fact to acknowledge and deliver these presents as its act and deed.

13 [Corporate Seal Air Mail Apparatus Corporation of America, Inc., Amaca.]

THE AIR MAIL APPARATUS CORPORATION OF AMERICA, INC.,
By KARL O. SPIESS,
Vice-President.

Liber W147, Page 458.

Attest:

[Corporate Seal Air Mail Apparatus Corporation of America, Inc., Amaca.]

W. T. WOODHOUSE, JR.,
Assistant Secretary.

DISTRICT OF COLUMBIA, *ss:*

I, Helen K. Gaylord, a notary public in and for the District of Columbia do hereby certify that Karl O. Spiess the person named as the attorney in fact in the foregoing and annexed deed, bearing date on the 18th day of March, 1931, personally appeared before me in said District of Columbia

and as attorney in fact as aforesaid, and by virtue of the power vested in him by said deed, acknowledged the same to be the act and deed of the Air Mail Apparatus Corporation of America, Inc., the grantor herein.

Given under my hand & seal this 23rd day of March, 1931.

[Seal of Helen K. Gaylord, Notary Public, District of Columbia.]

HELEN K. GAYLORD,
Notary Public, D. C.

Recorded Transfers of Patents, U. S. Patent Office Mar. 23, 1931. Liber W147, Page 457.

THOMAS E. ROBERTSON,
Commissioner of Patents.

14 EXHIBIT "C".

Filed Apr. 15, 1931, Frank E. Cunningham, Clerk.

Assignment.

Whereas I, Francis C. Roberts of Los Angeles, California have invented a certain new and useful device now known as the Air Mail Apparatus which will dispense air mail stamped envelopes and advertising data and for which application for letters patent of the United States has been made,

And whereas, my General Counsel, Harlan Wood, has rendered and will render valuable services in connection with said Air Mail Apparatus and the business to be conducted by me, either in my sole capacity or in the event of incorporation to the corporation.

Now, therefore, to all whom it may concern, that for and in consideration of said services rendered and to be rendered and the further sum of one dollar ($1.00) in hand paid, the receipt thereof is hereby acknowledged, I, Francis C. Roberts, have this 15th day of December, 1928 sold, assigned and transferred and do by these presents, sell, assign and transfer unto the said, Harlan Wood, Forty Nine per cent (49%) of my whole right, title and interest in and to the said invention and of the Air Mail Apparatus Company of America and to the letters patent therefor; the said undivided Forty Nine per cent (49%) to be held and en-

joyed by the said, Harlan Wood, for his own use and behoof and for the use and behoof of his legal representatives, heirs and assigns, to the full term for which letters patent are or may be granted as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof, I have hereunto set my hand and affixed my seal this 15th day of December, 1928.

FRANCIS C. ROBERTS.

In the Presence of:
IRENE VAN OVERMEER.

DISTRICT OF COLUMBIA, *ss:*

I, James H. Marr, a Notary Public in and for the
15 District of Columbia, do hereby certify that Francis C. Roberts party to a certain assignment, bearing date on the 15th day of December, 1928, and hereto annexed, personally appeared before me in said District the said Francis C. Roberts being personally well known to me as the person who executed the assignment and acknowledged the same to be his act and deed.

Given under my hand and seal this 15th day of December, 1928.

JAMES H. MARR, [SEAL.]
Notary Public, D. C.

Recorded in office Recorder of Deeds as Instrument No. 87. March 18, 1929; also Recorded in U. S. Patent Office February 24, 1931, in Liber N 147, at page 340.

I hold the original in my possession.

16 EXHIBIT "D".

Filed May 13, 1931.

Itemized List of Creditors of Defendant Corporation, Addresses, and Amounts Due to Them.

Cline's, 920 14th St. N. W. (Subject to credit allowance)	$459.52
C. & P. Telephone Co., 725 13th Street, N. W.	127.32
National Engraving Co., 1305 E Street, N. W.	81.22
E. M. Bryan Co., Inc., 813 13th Street, N. W.	79.95

Commercial Art Studios, Tower Building	55.00
Western Union Telegraph Co., 14th and G Streets, N. W.	11.48
Tax Department, State of Delaware, Dover, Del. (subject to penalty increase of 1% per month)	9.17
Mfgrs. Record Publishing Co., Baltimore, Md.	6.50
Underwood Typewriter Co., 1413 New York Ave. N. W.	1.00
Edith M. Burke, Apt. 301, Park Lane Apartments, 2025 E St. N. W., stenographic services	34.31
William Warfield Ross, Atty., 420 Union Trust Building	175.36
Internal Revenue Bureau (For Revenue stamps on stock issued, transferred, re-transferred or cancelled) subject to adjustment, approximately	500.00
Capitol Towel Service, 1111-17 20th Street, N. W.	1.75
Total	$1,542.58

Motion to Dismiss Bill of Complaint.

Filed June 17, 1931.

* * * * * * *

Comes now the defendants Air Mail Apparatus Corporation of America and Francis C. Roberts, by Harry S. Barger their attorney, and move the court to dismiss the Amended Bill of Complaint herein; and for grounds hereof they say:

1. The Amended Bill of Complaint states no facts constituting a cause of action cognizable in a court of equity.

2. It is apparent on the face of the amended bill
17 of complaint that plaintiff has a plain, adequate, and complete remedy at law for the establishment of his claim.

3. The claim of plaintiff, if well founded, is cognizable only in law, not in equity.

4. As appears from the face of the amended bill of complaint, plaintiff has not reduced his claim to judgment; and, therefore, he is without standing to ask the appointment of a receiver by this court, inasmuch as the appointment of a receiver would be the equivalent of laying an attachment in aid of an unsecured creditor before judgment.

5. As appears from the face of the amended bill of complaint, this court lacks jurisdiction to grant the relief prayed, inasmuch as the court is asked, in substance, to wind up the affairs of and dissolve a foreign corporation; and this may be done only in the state of the corporation's creation and residence, whether it be asked by a general creditor, stockholder, or other persons having interest in and claims against the corporation's assets.

And for other reasons apparent on the face of the amended bill of complaint.

HARRY S. BARGER,
Attorney for Defendants.

Messrs. Offutt & Imlay,
Kellogg Building,
Attorneys for Plaintiff:

Take notice that the points to be submitted in support of the foregoing and annexed motion, and the authorities intended to be used, are attached hereto. The Rules of Court require that, if you oppose the granting of said motion, you shall within five days from the date of the service of a copy of this notice upon you, or within such further time as the court may grant, or as the parties to this suit may agree upon, file in reply with the clerk of the court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for defendants.

Oral argument of this motion will be requested.

HARRY S. BARGER,
Attorney for Defendants.

18 Service of a copy of the foregoing and annexed motion and notice, and points and authorities, is acknowledged this 17th day of June, A. D. 1931.

CHARLES V. IMLAY,
Attorney for Plaintiff.

G. E. M.

Memorandum of Court.

Filed June 26, 1931.

* * * * * * *

The motion to dismiss the bill of complaint will be sustained. See Pusey v. Hansen, 261 U. S. 491.

BAILEY, *J.*

Order Dismissing Bill of Complaint.

Filed June 30, 1931.

* * * * * * *

On consideration of the motion of the defendants Air Mail Apparatus Corporation of America and Francis C. Roberts to dismiss the Amended Bill of Complaint herein, and the memoranda of points and authorities of counsel for plaintiff and defendants in support of and in opposition to said motion, it is, this 30 day of June, A. D. 1931, by the Court,

Adjudged, ordered, and decreed That said motion to dismiss said Amended Bill of Complaint be and the same is hereby granted, and the said Amended Bill of Complaint is dismissed, with costs against plaintiff.

JENNINGS BAILEY,
Justice.

The foregoing is approved as to form.
JOHN R. REED,
Of Counsel for Plaintiff.

19 From the foregoing Decree the plaintiff, by his counsel, notes an appeal in open court to the Court of Appeals; and bond for costs on appeal is hereby fixed at One Hundred Dollars ($100), with leave to plaintiff to deposit the sum of Fifty Dollars ($50) in cash in lieu of such bond.

JENNINGS BAILEY,
Justice.

Memorandum.

July 15, 1931.—Bond ($100) on appeal approved and filed.

Assignment of Errors.

Filed July 28, 1931.

* * * * * * *

1. The Court erred in refusing to entertain Plaintiff's bill of complaint.

2. The Court erred in sustaining the motion of Defendant- to dismiss the Plaintiff's amended bill.

3. The Court erred in holding Plaintiff must exhaust his legal remedy before bringing his bill for receiver *pendente lite.*

4. The Court erred in holding in effect that it had not jurisdiction to entertain Plaintiff's suit as an unsecured creditor.

5. The Court erred in holding in effect that Plaintiff as an unsecured creditor could not bring his bill for a receiver *pendente lite,* and to set aside transfer.

6. The Court erred in refusing to entertain Plaintiff's suit as a stockholder of Defendant corporation.

7. The Court erred in other respects apparent of record.

OFFUTT, IMLAY & SNYDER,
By CHARLES V. IMLAY,
Attys. for Plaintiff, Llewellyn Jordan.

20 *Designation of Record.*

Filed July 28, 1931.

* * * * * * *

Now comes Llewellyn Jordan, the appellant in the above entitled cause and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Amended bill to set aside transfer and for receiver, filed May 13, 1931.

2. Exhibits "A", "B", and "C" of the original bill, referred to by the same letters in the amended bill.

3. Exhibit "D" of the amended bill.

4. Defendants' motion to dismiss the amended bill, filed June 17, 1931.

5. Memorandum of Bailey, J. filed June 26, 1931.

6. Appellant's assignments of error, filed herewith.

Together with a copy of this designation.

OFFUTT, IMLAY AND SNYDER,
By CHARLES V. IMLAY,
Attys. for Plaintiff, Appellant.

Service acknowledged this 27" day of July, 1931.

HARRY S. BARGER,
Atty. for Defendant-, Appellee.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record, according to directions of counsel, herein filed, copy of which is made part of this transcript, in cause No. 52726 in Equity, wherein Llewellyn Jordan is Plaintiff and Air Mail Apparatus Corporation of America, a Corporation, and Francis C. Roberts are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of September, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5502. Llewellyn Jordan, appellant, vs. Air Mail Apparatus Corporation of America, a corporation, and Francis C. Roberts. Court of Appeals, District of Columbia. Filed Sep. 24, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 4 - 1931

Henry W. Hodges
CLERK

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5502.

LLEWELLYN JORDAN, *Appellant*,

v.

AIR MAIL APPARATUS CORPORATION OF AMERICA, a Corporation, and FRANCIS C. ROBERTS, *Appellees*.

BRIEF FOR APPELLANT.

CHARLES V. IMLAY,
JOHN R. REED,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5502.

LLEWELLYN JORDAN, *Appellant*,

v.

AIR MAIL APPARATUS CORPORATION OF AMERICA, a Corporation, and FRANCIS C. ROBERTS, *Appellees*.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

As this appeal arises from a decree of the Supreme Court of the District of Columbia dismissing the amended bill of complaint upon motion of counsel for the appellees (R. p. 15) without answer to said amended bill or the taking of testimony, the allegations in the amended bill of complaint must be taken as admitted for the purpose of this argument. These allegations are in substance as follows:

Appellee Francis C. Roberts prior to the existence of defendant Air Mail Apparatus Corporation of America, Inc., invented a certain machine for the automatic vending of air mail stamped envelopes and advertising data to be used in air mail, and for the popularizing of that method of communication. He further obtained permission from the United States Government to install a number of such machines in the larger post offices. For the purpose of financing the manufacture and installation of the apparatus, and managing the prospective business, appellee Air Mail Apparatus Corporation was organized, with appellant and the individual appellee among its original incorporators. The corporation was chartered in Delaware for the purpose of taking advantage of the well known liberal corporation laws of that state, and to satisfy the statutory requirements it maintained a formal office at the Corporation Trust Company there. However, it was for all practical purpose a District of Columbia Corporation, its main office with all books and accounts being located in the District of Columbia, and its president, vice president and all directors residing within the District of Columbia, this being the case during its entire existence.

On its organization, the corporation made with appellee Francis C. Roberts the agreement set forth as exhibit "A" to the bill (R. p. 7), in the following tenor: Francis C. Roberts assigned to the corporation his air mail vending apparatus, authorization to install the same in certain post offices, system of maintenance, and the "AMACA" trade-mark; in return for which the corporation agreed to deliver to Francis C. Roberts a certificate for 60,000 shares of stock, $5000. in cash, and certain promissory notes to be

paid out of stock sales and net earnings; to employ appellee Roberts as general manager on salary, with travelling expenses. Appellee Roberts received the 60,000 shares and has not relinquished the same, except to sell some for value.

Appellant Llewellyn Jordan, the plaintiff below, is a creditor as well as a stockholder of the corporation. On its organization, he paid costs of incorporation, for which he received 30 shares of the capital stock. Since then he advanced various sums aggregating $622.70, at the time of filing of the bill the subject matter of a suit against the corporation known as A-7758 in the Muncipal Court of the District of Columbia, and a sum of $5,000. for which he took the corporation's demand note dated December 9, 1929, and now dishonored.

In addition to these debts to appellant the corporation owes its attorney, Harlan Wood, for contract services, the sum of $10,800. basis of a suit in the Supreme Court of the District of Columbia, Law No. 79,567, with 8½ years more for the contract to run at $7200. per year. In addition to this there are debts set out in Exhibit "D" (R. p. 14) amounting to over $1500.

As against these debts, the only assets of the corporation are office furniture worth about $100 claimed by appellant Llewellyn Jordan as security, a specially fabricated model of the air mail apparatus, with no cash value, and the air mail apparatus patent. The latter while having no cash value has an uncertain value which will depend upon market conditions, the amount of money for promotion and other circumstances.

On March 18, 1931, the corporation reassigned to

appellee Roberts the patent, its chief asset, together with the trade-marks and the good will, all for the nominal consideration of $1.00. The shares of stock, paid to defendant Roberts for the patent and trade-marks, were not returned. In addition, the specially fabricated model, for which appellant Llewellyn Jordan paid the manufacturer $300., which sum is included in the aforementioned Municipal Court suit, was shipped out of the District of Columbia.

When he discovered these facts of the transfer and assignment of all the corporation's assets, appellant filed the suit for the dismissal of which he takes this appeal. The remedy appellant asked below was that a receiver be appointed to receive an assignment of the patent to be held *pendente lite,* and for the purpose of taking over the books, records and assets of the corporation before they could be removed from the territorial jurisdiction of the Supreme Court of the District of Columbia, and that by final order appellee Roberts be required to reassign the patent to the corporation. Right to such relief is predicated on the foregoing facts, and the allegations in the amended bill that the assignment was in fraud of stockholders because an irregular corporate action, and the alienation of the only valuable asset of the corporation, without which it could not function; and that it was in fraud of creditors because without consideration, and because it was the only marketable asset, the corporation being at the time insolvent.

ASSIGNMENT OF ERRORS.

Appellant assigns the following errors:

1. The Court erred in refusing to entertain plaintiff's bill of complaint.

2. The Court erred in sustaining the motion of defendant to dismiss the plaintiff's amended bill.

3. The Court erred in holding plaintiff must exhaust his legal remedy before bringing his bill for receiver *pendente lite.*

4. The Court erred in holding in effect that it had not jurisdiction to entertain plaintiff's suit as an unsecured creditor.

5. The Court erred in holding in effect that plaintiff as an unsecured creditor could not bring his bill for a receiver *pendente lite,* and to set aside transfer.

6. The Court erred in refusing to entertain plaintiff's suit as a stockholder of defendant corporation.

7. The Court erred in other respects apparent of record.

Errors "1, 2 and 7" are general and comprehend the rest.

The memorandum of the Justice below states only one ground upon which he thought the bill should be dismissed, namely, that appellant was not a judgment creditor. In this appellant submits the court below erred, as set forth in assignments of error Nos. 3, 4 and 5.

Appellant further submits that the bill might have been sustained upon a wholly independent ground, namely, that appellant was a stockholder and original incorporator of appellee corporation, and had a right to prevent its disposing of all its assets without consideration, to the damage of his interest, and had a right to relief in the District of Columbia which alone could prevent transfer to a bona fide purchaser, as set forth in assignment of error No. 6.

I.

AS A GENERAL CREDITOR OF APPELLEE CORPORATION, APPELLANT HAD A RIGHT TO MAINTAIN HIS BILL.

A. Appellant's remedy at law not adequate.

Appellant's remedy at law was not adequate. Had he tried to enforce a judgment against the appellee corporation and attach the patent right, which was its only asset of value (R. pp. 5, 6) as alleged in paragraphs 7 and 9 of the bill of complaint, he would have been compelled to resort to equity. *Ager v. Murray,* 15 Otto. 126; 105 U. S. 126; 26 L. Ed. 942.

The patent right at time of the institution of proceedings in the court below, was not in the name of appellee corporation, though rightfully its property. It had been fraudulently transferred to the president of the corporation. (R. pp. 4, 11). To set aside this transfer as fraudulent as against creditors, it was necessary to come into a court of equity. Only equity could prevent a further alienation of the patent, in which case it might reach the hands of a bona fide purchaser, and appellant's rights be cut off thereby.

Until the aforesaid patent should be reassigned to appellee corporation, the corporate business could not be carried on, and *a fortiori,* the corporation could not pay its debts to appellant and others, nor would it have assets upon which a levy could be made.

B. There was neither time nor necessity for reducing appellant's claims to judgment.

Where it is alleged in the bill of complaint as here in Paragraph 7 (R. p. 5) that a conveyance or trans-

fer is fraudulent and made for the purpose of defeating creditors, the plaintiff ought not to be required to first obtain judgment at law and levy execution thereon. The Supreme Court of the United States recognized the existence of such cases in *Case v. Beauregard,* 101 U. S. 688; *Case v. New Orleans & Carrollton R. R. Co.,* 25 L. Ed. 1004, at page 690 where the court says:

> "So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him."

The fundamental purpose of requiring a creditor to obtain judgment and levy execution before filing a creditor's bill or a bill to set aside a fraudulent transfer, is that of making sure he has no remedy at law. It would seem superfluous to make him go through this formality in the present instance where it is shown by the bill that a judgment would be fruitless, the debtor corporation being insolvent (R. p. 5) and having fraudulently conveyed its own valuable asset to the individual appellee who is alleged to be about to leave the jurisdiction (R. p. 5) before appellant's rights could be enforced at law. In addition there is the element of necessity of recourse to equity to reach a patent right even after judgment.

Even granting for the sake of argument the general rule that a creditor ought to show judgment and levy of execution when attempting to set aside a fraudulent transfer, there exists a well defined exception where the debtor is absconding. Such an action

has been termed an "equitable attachment" and is similar to the District of Columbia Code provision for attachment before judgment in such a case.

The doctrine is early found in *Scott v. McMillen*, 1 Littell 302; 13 Am. Dec. 239 (Ky. 1822). There Scott sold McMillen merchandise and took from him several obligations. At that time both resided in Kentucky. Later McMillen left the state, but prior to his departure conveyed to his brother all his property in the state. On some of his obligations becoming due, Scott exhibited his bill in chancery to set aside the transfers, joining transferee and transferor. The question of his remedy in chancery before obtaining judgment was raised. In answering this question the court says as follows (1 Littell 305, 13 Am. Dec. 241):

> "Notwithstanding, however, it may, in the general, be necessary for the creditor to establish his demand at law before he applies to a court of chancery, it cannot be admitted to be indispensable in every case. Cases may occur, and the present case was of that character when Scott's bill was filed, where, from the absence of the debtor from the country, the creditor would not be enabled to establish his demand at law."

After stating that proceedings to outlaw are not available in this country, the court continues:

> "Possessing, therefore, no means of establishing his demand at law, it would seem the creditor, ought, without first commencing an action at law, be allowed to apply to a court of equity for relief. It is not unusual for courts of equity to entertain jurisdiction, and give relief wherever the principles by which the ordinary courts are

> guided in their administration of justice give right, but from accident, or fraud, or defect in their mode of proceeding, those courts afford no remedy, or cannot give the most complete remedy."

Similar is the holding in *Kipper et al v. Glancey et al.*, 2 Blackford 356 (Ind. 1830) where the debtor concealed his property by putting it in the names of others, and left the state. Creditors brought bills in equity against the debtor and title holders, setting forth their demands on contract. At page 358 the court says in sustaining the lower court which overruled a demurrer to the bill:

> "By absconding from the state, the debtor prevents the proceeding against him at law, and his creditors should be permitted to apply to a court of chancery, as where judgments have been previously obtained, or the debtor is deceased."

The principle is also recognized in the following cases:

> *Pope v. Solomon et al.*, 36 Ga. 541 (1867).
> *Peay v. Morrison's Exec'rs,* 10 Gratt. 149 (1853).
> *Farrar v. Haselden,* 9 Rich. Eq. 331 (S. C.) (1857).

Pendleton v. Perkins and City of St. Louis, 49 Mo. 565 (1872), presents the following facts: Plaintiff presented a bill in equity against his debtor, charging he had absconded so that a judgment could not be obtained against him, and against the City of St. Louis, alleging there was money in the city treasury belonging to the debtor. The city demurred, de-

murrer was sustained and plaintiff appealed. The lower court was reversed. The court held (1) That the creditor's bill would lie without showing fraud of the debtor. (2) That remedy lay against the city because it was not subject to garnishment. (3) That the creditor might proceed against his absconding debtor without first obtaining judgment. On this last point, after a review of authorities, the court says at page 569:

> "To deny the relief sought would permit the debtor to withdraw property from the state which equitably belongs to his creditors."

This statement of the court sums up one of appellant's needs for relief: If the relief is not granted, the situs of the patent and all the corporate books, records and assets will be removed from the reach of this court. (R. p. 5.)

The exception typified by the "absconding debtor cases" is by no means new in the District of Columbia. Two cases adhere to the doctrine. *Droop v. Ridenour,* 9 App. D. C. 95; *Supplee Hdwr. Co. v. Driggs,* 13 App. D. C. 272.

The former case was a suit by Droop & Sons against Ridenour, a debtor whose property consisted of an equitable interest in real estate in the District of Columbia, which had been fraudulently conveyed. The bill alleged a debt not reduced to judgment, and that Ridenour had absconded. It asked that the conveyance be set aside and that Ridenour's interest be subjected to the claim of plaintiff. The trial court dismissed the bill on demurrer. The Court of Appeals reversed and remanded it. It is worth while to note what this Court says as to the necessity for

judgment and fruitless execution in such cases (p. 104):

> "This doctrine is clearly stated in the cases of *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451; and *Hollins v. Brierfield Coal and Iron Co.*, 150 U. S. 371, 379. But the application of this general rule must be taken as dependent upon and conditioned by the facts of each particular case; and it is not so strict and unyielding as to be wholly without qualification or exceptions, to meet the exigency of particular cases. There are many cases where the demands of justice, and the inadequacy of the ordinary process of law, make it necesary that equity should interpose, rather than that the creditor should be wholly without remedy or means of redress. All that is required of the complainant is that he has done all that he could do to make effective the remedy at law, or, in other words, that he has exhausted his legal remedies, or show that the remedy at law is wholly inadequate, or that the ordinary legal remedies do not apply to the case, and hence he is without a plain, adequate and complete remedy at law. As said by the Supreme Court in an unanimous opinion of that tribunal delivered by Mr. Justice Strong: 'After all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires meaningless form: *"bona sed impossibilia non cogit lex"*. It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not

> a necessary prerequisite to equitable interference;' the learned justice citing many authorities in support of the proposition stated by him. And further on, in the same unanimous opinion, it is said: 'The foundation upon which these and many other similar cases rest is that judgment and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.' *Case v. Beauregard,* 101 U. S. 688, 690, 691."

The opinion in this case was carefully considered after a thorough review of authorities, and is cited with approval and followed in *Supplee Hardware Co. v. Driggs,* 13 App. D. C. 272.

A reference to the bill in the present case shows it falls within the theory of *Droop v. Ridenour* and the other absconding debtor cases cited *supra,* and makes an even stronger appeal in the following respects:

1. It shows appellant at the time of the filing of his bill had already started to pursue his legal remedy to its fullest practical extent by filing in the Municipal Court of the District of Columbia a suit for part of the debt. (R. p. 2.)

2. Recourse to equity will be necessary in the end in any case as the only asset of value is the patent right (R. p. 5), similar to the rights in land in *Droop v. Ridenour, Supplee Hardware case, Scott v. McMillen and Kipper v. Glancey,* cited *supra,* and unattachable funds as

in *Pendleton v. Perkins,* 49 Mo. 565, cited *supra.*

3. The appellee corporation has already reassigned its patent to its president, the individual appellee (R. p. 4) in fraud of creditors. Fraud is a basis in itself for equitable intervention, and would be a basis for attachment before judgment at law. (*Sec. 445 Code, D. C.*)

4. The defendant is technically a non-resident corporation (R. p. 2), a non-residence taken advantage of in the motion to dismiss (R. p. 16). This presents facts similar to the individual debtor who has absconded, leaving property in the jurisdiction, the precise situation in which courts granted relief in the cases of *Droop v. Ridenour* and *Supplee Hardware Co. v. Driggs* (*supra*). Under these circumstances, appellant could have attached tangible property of the appellee corporation before judgment at law (Sec. 445 Code), and it would be a strange result if equity in its proper sphere would give him less relief than he would have had at law in analogous circumstances.

5. The present case is a stronger one for equitable relief than any found in the reports, for in addition to the usual elements, it is alleged here that appellee Roberts in whose name the patent right stands, is about to leave the jurisdiction. (R. p. 5) Thus even the property which is in part the basis of the court's jurisdiction was about to be removed, and a court of equity was asked to prevent this additional

fraud. The court in *Pendleton v. Perkins,* 49 Mo. 565, recognized this state of affairs and acted on it, but the court below refused so to act in which appellant submits the court erred.

C. Requirement of a judgment in the present case is a useless formality.

To require appellant to first obtain a judgment would be to require a useless formality. Such judgment would be worthless, as the corporation is insolvent. (R. p. 5.) It is proper at this point to call attention to the prayers in appellant's bill. (R. p. 6.) These are directed toward a transfer of legal title back to the corporation where it rightfully belongs. They do not ask that the patent be sold at this time, on the contrary it is alleged that the patent has no present cash value (R. p. 5), and is of no use except in the hands of persons with money to promote the same.

The object of appointing a receiver of a corporation is preservation of property, not confiscation. *Havemeyer v. Superior Ct.,* 84 Cal. 327; 24 P. 121.

D. The case cited by the lower court as the basis for its decision is not controlling in the present state of facts.

The court below based its decision on *Pusey & Jones Co. v. Hanssen* (1923), 261 U. S. 491; 67 L. Ed. 763. The facts in that case were as follows:

The Delaware Code provided that where a corporation was insolvent, the chancellor, on application of any stockholder or creditor, might in his discretion appoint receivers to take over and manage

the corporation. Hanssen, a subject of Norway, and an unsecured simple contract creditor, brought a suit in equity in the Federal Court in Delaware against the Pusey & Jones Co., a Delaware corporation. Receivers were appointed. In answer to a rule to show cause, defendant objected to the court's jurisdiction, denied that plaintiff was either a creditor or a stockholder, denied its insolvency and insisted on its right to have plaintiff establish his creditor relation at law. The District Court and Circuit Court of Appeals continued the receivership without passing on the rights of plaintiff as a stockholder, and basing the decision on authority conferred by the Delaware statute. The United States Supreme Court in reversing the Circuit Court of Appeals discusses the authorities generally in their application to the particular case, with considerable stress laid on the enlargement of jurisdiction of Federal Courts by state statutes.

Although that decision was not unanimous, Mr. Justice McKenna and Mr. Justice Sutherland dissenting, it represents the usual view *under the state of facts*. However, the facts are unlike those of the present case, for no need is shown for the remedy prayed. The debtor was not absconding, nor had it fraudulently transferred assets, and the action was as easily pursued at law. Defendant had answered the bill, and had disputed the entire claim. It has been shown *ante* herein that appellant had a special need for equitable aid, and no question of state statutes is involved.

The remedy prayed is different. Appellant does not ask a receiver of the corporation, but a receiver of assets. The difference is indicated hereafter.

II.

AT THE SUIT OF A MINORITY STOCKHOLDER OF AN INSOLVENT CORPORATION ALLEGING THAT THE CORPORATION HAS TRANSFERRED OR DISPOSED OF ALL ITS PROPERTY, THE COURT BELOW SHOULD HAVE APPOINTED A RECEIVER OF THE ASSETS OF THE CORPORATION IN THE DISTRICT OF COLUMBIA, AND SHOULD HAVE SET ASIDE A FRAUDULENT TRANSFER THERE.

A. Appellant had no remedy at law.

No argument is required to show that a stockholder has no remedy at law to set aside a fraudulent conveyance of the corporation. Appellant is alleged to be a stockholder and original incorporator in Paragraph 4 of the bill of complaint (R. p. 3), which bill further alleges that the transfer of the patent was unauthorized and *ultra vires* (R. p. 5) for the purpose of defrauding creditors, and deprived the corporation of its only valuable asset without which it could not carry on its corporate business. (R. p. 6.)

B. Appellant had a right to interfere.

There is abundant authority supporting the right of a minority stockholder to enjoin his corporation from selling, leasing or transferring all its property.

Keane v. Johnson, 9 N. J. Eq. 401.
Colgate v. U. S. Leather Co., 75 N. J. Eq. 229.
Abbott v. Am. Hard Rubber Co., 33 Barb. 578.

Mayerhoff v. Bankers Securities, Inc., 105 N. J. Eq. (1929), 76.
Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264; 47 N. W. 797.
Black v. Del. & Raritan Canal Co., 24 N. J. Eq. 455.
Forrester v. Boston & M. etc. Co., 21 Mont. 544.
New Albany Water Works v. Louisville Banking Co., 122 Fed. 776.
R. C. L. Corporations, Sec. 293.

C. Appellee, a corporate officer, violated his duty of good faith toward stockholders.

In general, the directors and officers of a corporation are held to a high standard of good faith, and will not be allowed to deal with corporate property for their own gain. Courts view their dealings with themselves with jealousy. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; 23 L. Ed. 328; *McCourt v. Singers Bigger*, 145 Fed. 103. Here it is alleged that appellee Roberts was the president of the corporation (R. p. 2) and that the patent was transferred to him to defeat the rights of other stockholders (R. p. 5), being unauthorized and without consideration (R. p. 5). Even *sale* of corporate property to a majority stockholder is voidable at the election of the minority. *Wheeler v. Abilene National Bank Building Co.*, 159 Fed. 391, and cases collected at page 394 therein. All cases that can be cited where the courts have upheld the disposition of all corporate assets without stockholders' consent are those in which there has been a *bona fide* sale, in the absence of fraud. Here there was fraud, and no sale, but a transfer to

an officer of the company, which must be set aside in equity.

D. The court had jurisdiction to grant the relief prayed.

It was contended in the lower court (R. p. 16) that the relief prayed requiring the interference with internal affairs of a foreign corporation, the court could not go into the matter. Nothing in the memorandum of the trial judge (R. p. 16) shows that he considered this question at all. *Pusey and Jones Co. v. Hanssen,* cited by the lower court, at the end of the opinion, expressly reserves decision on the question of Hanssen's rights as a stockholder.

It is true in the majority of cases a court of equity will not interfere with internal affairs of a foreign corporation, but the rule is not applicable to the present case.

The exercise of the power over a corporation duly served and in court is a matter for sound judicial discretion.

Note 18 A. L. R. 1386.
Chicago Title & Trust Co. v. Newman, 187 Fed. 573.
Babcock v. Farwell, 245 Ill. 14; 91 N. E. 683.
Watkins v. North Amer. Land Co., 106 La. 621; 31 So. 172.
Corry v. Barre Granite Co., 91 Vt. 413; 101 Atl. 38.

The courts which refuse to exercise their powers do so because of the impropriety of taking jurisdiction, or the ineffectiveness of the remedy. Those courts which base their objections on impropriety will act in either of two cases:

(1). Where the corporation is non-resident in name only.

(2). Where the officers, agents, business and property are within the jurisdiction of the court.

Babcock v. Farwell, 245 Ill. 14; 91 N. E. 683.

Watkins v. N. Amer. Land Co., 106 La. 621; 31 So. 172.

Corry v. Barre Granite Co., 91 Vt. 413; 101 Atl. 38.

Cunliff v. Consumers Asso. of Amer., 280 Pa. 263; 124 Atl. 501 (1924).

Starr v. Bankers Union, 81 Neb. 377; 116 N. W. 61 (1908).

Kelly v. Thomas, 234 Pa. 419; 51 L. R. A. (N. S.) 122; 83 Atl. 307.

In the appellant's bill of complaint, paragraph 2 (R. p. 2) the facts alleged comprehend both these exceptions. With all parties present in court, and the books and records in the District of Columbia, there is no reason why the court should not act.

The other objection to acting in cases involving foreign corporations, and appellant submits the fundamental one, is the impossibility of enforcing a decree in most cases. This is the reason assigned in the District of Columbia. *Clark v. Mutual Life Assn.,* 14 App. D. C. 154.

That case involved the restraining of collection by an insurance company of sums payable in New York, at the home office, and the restraining of the corporation from voiding or lapsing the plaintiff's policy. The court very rightly held that it could not control actions in the New York office, or compel an accounting where the books were in New York.

There was no one in the District against whom contempt proceedings could be brought. These objections in no way apply to appellant's case. The officers in control of the corporation are in the District subject to contempt proceedings; the corporation has entered a general appearance, and its records and all property are within the jurisdiction, where, *and only where* a contempt proceeding can be brought, it appearing of record (R. p. 2) that only a nominal agent resides in Delaware.

In accord the following cases also base their holdings on the power of the court in a given case to enforce its decree:

Hallenborg v. Greene (1901), 66 App. Div. 590; 73 N. Y. S. 403.

Watkins v. N. Amer. Land and Timber Co. (1901), 106 La. 632; 31 So. 172.

Taylor v. Mut. Reserve Fund Life Asso. (1899), 97 Va. 60; 45 L. R. A. 621; 33 S. E. 385.

Ganzer v. Rosenfeld (1913), 153 Wis. 442; 141 N. W. 121.

Chicago Title and Trust Co. v. Newman, 187 Fed. 573.

Watkins v. N. Amer. Land Co., 106 La. 621; 31 So. 172.

State ex rel. Minnesota Mut. Life Ins. Co. v. Denton, 229 Mo. 187; 129 S. W. 709.

E. The general appearance entered by appellees justifies the Court in going into the merits of the case.

Where a general appearance has been entered in a suit to have a receiver appointed, and the assets of the corporation are in the state, it has been held that the court can decide the merits of the case even if it involves internal affairs. *Chicago Title and*

Trust Co. v. Newman (1911), 187 Fed. 573; 109 C. C. A. 203.

F. Appellant does not ask that appellee corporation's affairs be wound up.

It is to be noted that appellant does not ask that appellee corporation's affairs be wound up, or that a receivership be decreed. The relief prayed is a receiver *for the assets pendente lite*, and that they be restored to the corporation. Such relief has been grantd repeatedly.

Palmer v. Texas, 212 U. S. 118; 53 L. Ed. 435.
Shinney v. N. Amer. etc. Bldg. Co., 97 Fed. 9.
Lewis v. Amer. Naval Stores Co., 119 Fed. 391.
Sims v. United Wireless Telegraph Co., 179 Fed. 540.
Barley v. Gittings, 15 App. D. C. 427.
Mitchel Mining Co. v. Emig, 35 App. D. C. 527.
McAtamney v. Commonwealth Hotel Const. Corp. (1924), 296 Fed. 500.
Jno. H. McGovern Co. v. Ingalls, 60 Fla. 116; 53 So. 932, and abundant state authorities.
3 Cook Corp. (5th Ed.) Sec. 865.

Appointment of such a receiver *pendente lite* is a conservative measure, and all presumptions in favor of its propriety will be indulged.

Clark v. Bradley Co., 6 App. D. C. 443.
Provident Relief Asso. v. Vernon, 57 App. D. C. 235; 19 F. (2d) 709.

Suit for the restoration of misappropriated corporate assets or fraudulent transfer of personalty within the state as in the principal case was held proper in the following cases:

Babcock v. Farwell, 245 Ill. 14; 91 N. E. 683.
Wineburgh v. U. S., etc. Advertising Co., 173 Mass. 60, 53 N. E. 145.
Miller v. Quincy (1904), 179 N. Y. 294; 72 N. E. 116.
Acken v. Coughlin (1905), 103 App. Div. 1; 92 N. Y. S. 700.
Hallenborg v. Greene (injunction), (1901), 66 App. Div. 590; 73 N. Y. S. 403.
Kidd v. New Hampshire Traction Co. (1903), 72 N. H. 273; 66 L. R. A. 574; 56 Atl. 465.

G. The case upon which the lower court based its decision has no application to a stockholder's rights.

Pusey and Jones Co. v. Hanssen, as pointed out on pages 14 and 15 herein, was a suit brought by a creditor. It was treated throughout as such. Not only did the court refrain from passing on the matter of the availability of such relief to a stockholder, but it went the further step of expressly reserving a decision on a stockholder's rights. Thus the very text of the court's opinion distinguishes it from the present case.

CONCLUSION.

It is submitted that the chief duty of equity is avowedly to correct and supplement the law. It has been said that equity suffers not a right without a remedy.

The present case is one of a type presenting the problem for the solution of which the jurisdiction exists. Yet a plaintiff who has no other recourse is denied relief on a purely technical point. With no time to pursue his action at law to judgment to give

him standing as a judgment creditor, and no time to institute proceedings in the domicil of a corporate defendant and have ancillary aid in the District of Columbia to prevent the ruin of his corporation, yet he has been denied the right of preventing a further fraud and has been told in effect that he must let the only asset of the corporation be alienated and his rights cut off. As pointed out before, there exists no practical reason why the lower court could not have granted appellant the relief he prayed, and there being ample authority for granting such relief, appellant respectfully submits that the court erred, and that its decree dismissing the amended bill of complaint should be reversed, and the proceedings remanded.

Respectfully submitted,

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